MORTGAGES

Transferee's Assumption of Mortgage Debt — Acceptance by Mortgagee — Rescission of Assumption

In July, 1926, D. M. Herrold and his wife executed their promissory note for $15,000 to The Central Savings Bank payable one year from date and secured by a real-estate mortgage. The bank assigned the note and mortgage to Emma Anderson but continued to act as her agent in collecting rent. She instructed the bank to collect the debt at maturity. Subsequently, but before the note had matured, she was informed by the bank that Herrold and his wife had conveyed the premises to E. M. Brickell and M. P. Kirchhofer and as part of the consideration therefor the grantee expressly assumed and agreed to pay the mortgage debt. Mrs. Anderson instructed the bank to investigate the financial responsibility of both grantees. After being satisfied with the report, she instructed the bank to let the loan stand at maturity and continue to accept interest only. In January, 1928, Brickell and Kirchhofer conveyed the premises to D. M. Herrold, the original mortgagor, who again assumed the mortgage. Herrold, with his wife joining, again conveyed and subsequently several other conveyances followed, in each of which the grantee assumed the payment of the debt. The last grantee made an assignment for the benefit of creditors and the property was sold to Mrs. Anderson at a public sale for $10,000. This action was brought against all the grantees to recover a deficiency judgment. Brickell and Kirchhofer were the only defendants who filed an answer. Their defense was that there had been no adoption or acceptance by the plaintiff of their agreement to assume the debt prior to the time of their conveyance to Herrold. This, they contended, amounted to a rescission of the covenant to assume the mortgage. The common pleas court of Stark County held, however, that the plaintiff-mortgagee should recover the deficiency from Brickell and Kirchhofer. *Anderson* v. *Herrold*, 23 Ohio L. Abs. 97, 7 Ohio Op. 447 (1936).

It is a well established rule in most jurisdictions that where a purchaser of mortgaged realty assumes and agrees to pay the mortgage debt he becomes personally liable for the debt. Note, 21 A.L.R. 446 (1922); *Walser, Admr.* v. *Farmers Trust Co.*, 126 Ohio St. 367, 185 N.E. 535 (1933). *Contra, Prentice* v. *Brimhall*, 123 Mass. 291 (1877). This assumption may be implied or express. *Hawthorne Valley Co.* v. *Investment Co.*, 28 Ohio N.P. (N.S.) 422 (1931). If the promise is oral it does not fall within the Statute of Frauds. See, *Society*

of Friends v. *Haines*, 47 Ohio St. 423, 25 N.E. 119 (1890). The grantee is not personally liable, however, where the land is conveyed to him merely subject to the mortgage. As against him the mortgagee must look to the land alone. *Ryan* v. *Building and Loan Co.*, 29 Ohio App. 476, 163 N.E. 719 (1928). Some states, by statute, limit the liability of the grantee to the grantor but permit the mortgagee to bring an action in the grantor's name for the use of the grantor provided his consent is obtained. *Fisher* v. *Reach*, 202 Pa. 74, 51 Atl. 599 (1902).

In order that the mortgagee may be allowed to recover on these contracts of assumption it is necessary to overcome two possible objections: the lack of privity between himself and the grantee, and the absence of a consideration moving from the mortgagee for the grantee's promise. Two theories have been recognized in this connection. Some courts permit recovery on the ground that a suretyship relation is established giving the mortgagee-creditor the right of subrogation to any security held by the mortgagor-surety as against the grantee-principal. *Keller* v. *Ashford*, 133 U.S. 610, 10 Sup. Ct. Rep. 494, 33 L. Ed. 667 (1889); *Crawford* v. *Edwards*, 33 Mich. 354 (1876). The majority, however, employ the theory that the mortgagee is a third party beneficiary. *O'Conner* v. *O'Conner*, 88 Tenn. 76, 12 S.W. 447, 7 L.R.A. 33 (1889); *Dean* v. *Walker*, 107 Ill. 540, 47 Am. Rep. 467 (1883). Ohio favors this doctrine. See, 8 Cinn. L.R. p. 103, and *Mullin* v. *Claremont Realty Co.*, 39 Ohio App. 103, 177 N.E. 226, 34 Ohio L. Rep. 335 (1930).

Where the mortgagee has not been a party to the transaction the agreement does not amount to a novation. Both the grantor and the grantee are liable to the mortgagee. He may sue either or join both as parties defendant. 1 Williston, Contracts (1920), sec. 393. In case the grantor releases the grantee, or together they rescind their agreement, the mortgagee is likely to protest that such action is impossible without his consent. Where recovery is based upon the equitable doctrine of subrogation the agreement may be rescinded before the mortgagee accepts or relies thereon. *Fisk* v. *Wuensch*, 115 N.J. Eq. 391, 171 Atl. 174 (1934). If the doctrine of subrogation is consistently applied, it would seem that the grantor should be able to release his grantee even after the mortgagee has accepted the promise. 1 Williston, Contracts, *supra*, sec. 384. But acceptance by the mortgagee and reliance thereon has generally been held to prevent a rescission as against him. *Hubard* v. *Thacker*, 132 Va. 33, 110 S.E. 263, 21 A.L.R. 423 (1922). A voluntary release of the grantee by the mortgagor before acceptance by

the mortgagee is void where the mortgagor is insolvent. Such an act amounts to a fraud upon his creditors. *Young* v. *Trustees*, 31 N.J. Eq. 290 (1879).

In those jurisdictions relying upon the third party beneficiary theory there is a split of opinion as to when the right of the mortgagee is perfected so as to prevent a rescission. A few courts hold that by virtue of the agreement itself the mortgagee gets an indefeasible right to hold the grantee. *Bay* v. *Williams*, 112 Ill. 91, 1 N.E. 340, 54 Am. Rep. 209 (1884); *Starbird* v. *Cranston*, 24 Colo. 20, 48 Pac. 652 (1897). The majority, however, take the position that the mortgagee must accept the benefits of the agreement or in some way act in reliance thereon. *Gilbert* v. *Sanderson*, 56 Iowa 349 (1881); *Insurance Co.* v. *Aitkin*, 125 N.Y. 660, 26 N.E. 732 (1891). Such a divergence of views can best be explained by the fact that the majority of the courts give the mortgagee the status of a creditor beneficiary whose rights are purely derivative. See Williston, *supra*, sec. 396, 397, and A.L.I. *Restatement of the Law of Contracts*, sec. 143.

It is not clear just what constitutes a sufficient acceptance. Mere knowledge without more will not create a vested right. *Whiting* v. *Gearty*, 14 Hun. (N.Y.) 498 (1878). However, some hold that bringing suit before the rescission is all that is required. *The Home* v. *Selling*, 91 Ore. 428, 179 Pac. 261, 21 A.L.R. 403 (1919). Payment of principal and interest by the grantee to the mortgagee is sufficient. *Smith* v. *Kibbe*, 104 Kan. 159, 178 Pac. 483, 5 A.L.R. 483 (1919). Cf. *Insurance Co.* v. *Hastings*, 100 Ind. 496 (1885). Notice of acceptance must be given by the mortgagee to the grantee. *Carnahan* v. *Tousey*, 93 Ind. 561 (1882). *Contra*, *Hill* v. *Holdtke*, 104 Tex. 594, 142 S.W. 871, 40 L.R.A. (N.S.) 672 (1911).

The position taken by the Ohio courts is set out in the case of *Motz* v. *Root*, 53 Ohio App. 375, 4 N.E. (2d) 990, 18 Ohio L. Abs. 377, 7 Ohio Op. 174 (1934), where the court held that the mortgagee's right is in the nature of an option and he has no right to enforce the agreement until he has done something to show his assent thereto. In the *Motz* case the court also held that receiving interest from the grantee did not amount to an acceptance, adoption or assent of the grantee's assumption. In the principal case it would seem that the plaintiff's insistence that the mortgage debt be collected at maturity when the premises were held by the mortgagor and the subsequent waiver of such a demand in reliance upon the grantee's financial responsibility was sufficient to justify the finding that there was an assent to and reliance upon the grantee's assumption.

Where the grantee is still free to rescind, a reconveyance in which his grantee, the mortgagor, reassumes the mortgage debt has been held to amount to a valid release of the prior agreement to assume the mortgage. *Morstain* v. *Kircher*, 190 Minn. 78, 250 N.W. 727 (1933). In the principal case the court stated that the conveyance from Brickell and Kirchhofer to Herrold alone did not amount to a rescission since Herrold and his wife were the original grantors. Such a position can hardly be justified if the wife joined in the conveyance merely for the purpose of releasing her right of dower. Simply naming her as grantee in the deed would give her an interest greater than that which she had previously conveyed. If the court meant that the right of dower released by the wife to the grantee must now be reconveyed to her, this could only be done on the assumption that a third party may have the wife's dower outstanding even though the fee is in her husband. The release of the right of dower operates to extinguish and not to transfer an interest. The releasee does not get an interest, but only the immunity from the releasor asserting it. See *Black* v. *Kuhlman*, 30 Ohio St. 196 (1876). The right of dower cannot be separated from the principal estate. *In re Lingafelter*, 104 C.C.A. 38, 181 Fed. 24 (1910), which affirmed 8 Ohio L. Rep. 230 (1909). If it is correct to assume that the wife merely released her right of dower it would seem from an analysis of the effect of the release that the act of reconveyance to the wife as required by the court would be of no legal significance.

HOBERT H. BUSH

NEGLIGENCE

DUTY OF DRIVER OF SCHOOL BUS IN REGARD TO CHILDREN WHO HAVE JUST LEFT THE CAR

Plaintiff's seven-year-old son and several other children alighted from the school bus, which the defendant was driving, when it made its usual stop across the road from his home. Whether the child went to the front or rear of the bus in order to cross the road, was disputed by the evidence; but when the bus started up again, the little boy was run over. The driver had no actual knowledge of the child's proximity to the bus; but, seeing other children going across the road and no one in front of the bus, he believed they were all out of the way. The jury found the defendant not negligent, and a judgment for the plaintiff was sustained in the Court of Appeals. In the syllabus, however, it was laid down as a matter of law that, "A driver of a school bus, in the exercise